U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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[redacted]

DATE: APR 03 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computer engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on August 11, 2010. The petitioner documented his bachelor's and master's degrees, and his employment at the [redacted] from 1995 to 2003. The petitioner also submitted copies of two recommendation letters commenting on the petitioner's work on specific projects. In a July 23, 2001 letter, the head of human capital management at the [redacted] (whose signature is illegible) congratulated the petitioner "for the design and successful completion of the new Data Centre" and for "the smooth migration to the new system without disruption to the bank's operations."

In a letter dated September 26, 2002, [redacted] stated:

> The Federal Road Safety Commission (FRSC) has a huge database which contains the information of all Nigerian drivers and vehicles registered in the country. A system like this can only [be] entrusted to competent professionals.
>
> [The petitioner] led a team of engineers to provide an in-depth assessment of the internal network infrastructure and resources in order to evaluate the Commission's network integrity, performance and vulnerabilities. At the end, the engineers came up with a model to encrypt, transmit and decrypt information over our network.
>
> I have much confidence in [the petitioner] and [would] not hesitate to recommend him to anyone requiring his services. The experience and professionalism he brought to the project was quite commendable.

From its wording, the letter quoted above appears to be a recommendation letter for the benefit of prospective employers. The two quoted letters establish the petitioner's successful completion of specific projects, but they do not show his standing in the field or make a meaningful comparison between his achievements and those of other qualified professionals in his field.

The petitioner also submitted two samples of his work product: [redacted] October 2009, subtitled "A solution provided for [redacted] and [redacted] February 2010, subtitled "A White paper presented to [redacted] These materials show that the petitioner has worked as a consultant or contractor, providing computer security services to clients. Congress, however, created no blanket waiver for professionals in that field. Therefore, it cannot suffice for the petitioner merely to show that he works in the computer security field. He must show why it is in the national interest to waive the job offer/labor certification requirement for his sake.

On January 21, 2011, the director issued a request for evidence, acknowledging the intrinsic merit of the petitioner's occupation but instructing the petitioner to submit "documentation beyond testimonial statements" to meet the other two prongs of the *NYSDOT* national interest test.

In response, counsel asserted that the petitioner's occupation is national in scope because improvements in computer security can be applied throughout national computer networks. The director did not contest this explanation. Counsel also made several assertions later repeated on appeal. The AAO will discuss those assertions in that context.

The petitioner submitted copies of his previously submitted "white papers," along with two additional essays: the undated *Internet Risks and Security Metrics Model*, and, from October 2008, *Internet Crime Against U.S. Government[,] Businesses, and Families: Identifying the Problems and Providing Solution* [*sic*], subtitled "A paper presented in support of immigrant visa application." The petitioner originally

submitted the latter essay in support of a prior petition filed in 2009. The director denied that petition later the same year, and the AAO dismissed the petitioner's appeal in 2010. In that dismissal order, the AAO stated:

> The petitioner submitted no specific information about his vaguely-described research, and no evidence that he has, in the past, had any success, or any experience of any kind, actively fighting cybercrime (as opposed to handling computer security for past employers). Rather, he described future plans without any indication that he has taken any concrete action to implement them.

The same attorney represented the petitioner in the earlier proceeding and in the present matter. Counsel did not explain why the same evidence that the AAO previously found to be insufficient should now qualify the petitioner for a national interest waiver.

The petitioner's own assertions about the nature and significance of his work cannot establish eligibility for the waiver. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The director had requested "documentation beyond testimonial statements" to establish the importance of the petitioner's work. The petitioner, in response, submitted testimonial statements from various former employers and clients in Nigeria. Two of the letters, like those submitted previously, were several years old, and essentially recommendation letters provided after the completion of specific projects. [redacted] commended the petitioner "for the successful completion of the design and configuration of the [redacted] infrastructure and security . . . for interconnecting our branch network." [redacted] stated that the petitioner "demonstrated a vast knowledge and his performance was exceptional, with high quality deliverables, on schedule and within budget."

In a July 18, 2002 letter, [redacted] stated that the company had employed the petitioner as a technical consultant since 1996, during which time the petitioner "successfully executed over twenty projects for our company. . . . His work was a major factor in our continued growth."

The remaining three letters all date from mid-February 2011. [redacted] and [redacted] – Oil Field Supplies," stated:

> In 2001, our company had signed a major contract with [redacted] which required that we build a new state of the art Data Center at our office in [redacted]

> [The petitioner] was the engineer assigned to the project. [The petitioner had] an immediate impact, installing, configuring and testing the system. It was about the steepest learning curve that you could put any one person into and [the petitioner] took on the challenge with no hesitation.
>
> . . . His skill and dedication helped us meet the deadline requirement from NNPC.

[redacted] provided what appears to be a standard employer recommendation letter, stating that the petitioner worked there from 1999 to 2002, and "was a valued member of the development team and a key resource for all projects that he led." A description of the petitioner's duties included "designing and implementing enhanced network security systems for our clients."

[redacted] stated:

> Leading a team of engineers, [the petitioner] designed and implemented an Intrusion Detection System using Snort that helped detect malicious traffic entering and leaving the commission's network. Using LANguard, he was able to eliminate all possible virus outbreaks.
>
> He was personally responsible for building a cost-effective firewall running on the OBSD 3.0 Operating System and performed vulnerability assessments on all devices. The findings were used to lay down the framework for a more secure IT environment.
> . . .
>
> Generally speaking, [the petitioner's] effort has given the department peace of mind, and we are now able to perform our duties without the fear of clients' information being compromised. Equipment downtime has been drastically minimized, and this has translated to significant cost savings.

None of the witnesses indicated that the petitioner's work has had a significant impact on computer security throughout the field. Furthermore, none of the witnesses claimed expertise in computer security. Rather, they had hired the petitioner specifically to provide services not available in-house.

Client satisfaction, while an important goal of any contractor or consultant, is not a self-evident indicator of eligibility for the national interest waiver. It is, rather, a basic benchmark of professional competence. To approve the waiver on the basis of client satisfaction alone would be to imply, wrongly, that the job offer/labor certification process is meant only for workers who are unable, or barely able, to complete jobs to their employers' or clients' satisfaction.

The director denied the petition on June 27, 2011, stating that the petitioner failed to establish that his abilities or accomplishments set him apart from others in the field to an extent that would warrant a national interest waiver.

On appeal, counsel repeated prior assertions relating to exceptional ability. As explained above, exceptional ability does not qualify one for the national interest waiver. Rather, it is (along with, in the alternative, status as a professional holding an advanced degree) a necessary precondition for consideration for the waiver.

With respect to the individual merits of the petitioner, counsel states:

> The applicant has over 10 years of experience. He is a member of the [redacted] and [redacted] and [redacted] The applicant is also the recipient of [redacted] at Lagos State University in 1992. The applicant was a recipient of the [redacted] award at Lagos State University in 1992.

The above assertions appear to relate to the regulatory standards to establish exceptional ability in the sciences, the arts or business, listed in the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii). (Counsel quotes those regulations on appeal.) Those standards concern experience, memberships, recognition for achievements, and other factors that may help to establish exceptional ability. As previously noted, however, evidence of exceptional ability does not, by default, establish eligibility for the national interest waiver. Section 203(b)(2)(A) of the Act clearly states that aliens of exceptional ability are typically subject to the job offer requirement. The national interest waiver is a separate benefit, not an automatic consequence or corollary of exceptional ability.

Counsel correctly observes that USCIS should not hold the petitioner to the higher standards of extraordinary ability, set forth at section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(3). This assertion is true enough, but it is equally true that it is not sufficient to show exceptional ability. There is a middle range between these two points. To state that the petitioner must exceed the standards of exceptional ability is not the same as to require national or international acclaim (the statutory standard for extraordinary ability).

Turning to the petitioner's individual merits, counsel claims: "the urgent need to prevent the adverse impact a system failure would have on the national security, required the abilities of someone like the applicant who is already well entrenched in specialized research work in his field." Counsel adds:

> the types of employers who desired someone with the petitioner's expertise, especially US government agencies, and the military could not offer him a position because his high level employment requires access to various facilities for which lawful permanent residency or U.S. citizenship is required. . . .

> In addition, many governmental agencies do not have a policy of filing labor certifications on behalf of foreign nationals. . . .
>
> In the instant case, a labor certification is impossible. This is because the applicant, who plans on a non-profit to improve on the computer security systems, would never be able to sponsor himself through a labor certification as there would be no distinct employer.

Counsel thus offers two contradictory explanations. First, counsel stated that the military or some other part of the United States government would benefit from his services, but could not or would not file a labor certification for him. Then, counsel states that the petitioner seeks to be self-employed at his own non-profit organization. If the petitioner has no intention of working as an employee of the government or military, then those institutions' policies regarding labor certification is irrelevant.

Significantly, the petitioner submitted no evidence to show that any United States government entity, military or civilian, had expressed any interest in employing the petitioner – directly or as a contractor – to provide computer security services. Counsel simply declares that such a demand exists. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertion that the government cannot employ the petitioner without a waiver means little if the petitioner cannot show that the government has any interest in employing him.

USCIS acknowledges that labor certification is not available to self-employed individuals. Nevertheless, by law, the standard for the waiver is not whether labor certification is available, but whether an exemption from the requirement is in the national interest. *See NYSDOT*, 22 I&N Dec. 218 n.5.

Counsel asserts that the labor certification process "would be futile" and "senseless." The AAO notes that a prospective employer [redacted] did, in fact, obtain a labor certification on the petitioner's behalf in 2009. The employer allowed the labor certification to expire. Nevertheless, its existence demonstrates that an employer can obtain a labor certification on the petitioner's behalf.

Counsel states that the petitioner "is widely recognized as playing a fundamental role in his endeavor, through the use of technology that is crucial to national security." As stated previously, counsel's assertions are not evidence. The passive-voice claim that the petitioner "is widely recognized" does not explain who it is that supposedly recognizes the petitioner in the way claimed. Counsel cannot simply declare that recognition exists, from some unspecified source. None of the evidence in the record points to widespread recognition of the petitioner as "playing a fundamental role in his endeavor."

The national importance of computer security is not in dispute in this proceeding. Rather, the denial of the petition rests on the absence of evidence to show that the petitioner's work has had a substantial impact and influence on the field, which would justify a conclusion that further important contributions lie in store. Counsel has claimed that the petitioner "is widely recognized as playing a fundamental role in his endeavor," but the record contains nothing to support that assertion. The petitioner has established only that specific clients have been satisfied with his work. The petitioner's various reports, essays and white papers show that he has written on the subject of computer security, but the petitioner has documented only the existence of those writings, not their influence. The petitioner has not shown what sort of a difference he has made in his field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.